No. 09-1343

Supreme Court, U.S.
FILED
OCT 20 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

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J. MCINTYRE MACHINERY, LTD.,

Petitioner,

v.

ROBERT NICASTRO, *ET UX.*,

Respondents.

♦

On Writ Of Certiorari To The New Jersey Supreme Court

♦

BRIEF OF AMICI CURIAE ARKANSAS, ARIZONA, HAWAI'I, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MISSOURI, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, & WEST VIRGINIA IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, including New Jersey, may be subject to *in personam* jurisdiction of a New Jersey court in a products liability action when its product causes injury in that State.

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INTEREST OF AMICI CURIAE

The question presented in this case is the extent to which each State may constitutionally exercise its jurisdiction over foreign defendants whose products cause harm within the State. The amici, Attorneys General of the signatory States, have a significant interest in the resolution of that question. Each State has a compelling interest in protecting its citizens from dangerous or defective products and providing a forum for relief when such a product causes harm. Each State also has an interest in protecting its citizens from being unjustly haled into the courts of other States. The States have an interest in the articulation of a clear rule governing personal jurisdiction in the products liability context to provide guidance to our courts and our citizens.

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SUMMARY OF THE ARGUMENT

Pursuant to traditional police powers, States undeniably have authority to protect their citizens from dangerous and defective products and provide a forum for relief when such a product causes harm. Personal jurisdiction doctrine limits these powers only to the extent necessary to serve two important goals: preserving the balance of power between the States and protecting the due process rights of individuals, which the Court has held includes the right to choose those jurisdictions to whose authority one submits himself. The Court's personal jurisdiction

jurisprudence has always contained an element of free will, first expressed in *Pennoyer v. Neff*, 95 U.S. 714 (1850), through the defendant's choice to be physically present within the State's territorial boundaries, and later embodied in the intent requirements inherent in "voluntary minimum contacts" and "purposeful availment." *See, e.g., International Shoe v. Washington*, 326 U.S. 310, 316 (1945), *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). The Court has explicitly recognized the need for personal jurisdiction jurisprudence to adapt to advances in technology and changing business practices, but emphasized that the rule must always contain an element of intent in order to satisfy due process. *See Hanson v. Denckla*, 375 U.S. 235 (1958).

Following *Asahi*, lower courts have successfully adapted the stream of commerce theory to internet-based commerce, developing a sliding scale that focuses on the extent and type of internet communications at issue. These cases demonstrate that the Court's "purposeful availment" rule works best when courts are free to evaluate purpose in light of the particular facts of each case rather than being hamstrung by narrow formulas or outdated examples. The Court should heed the warning in *Hanson v. Denckla* and articulate a clear yet flexible test for "purposeful availment" that allows lower courts to evaluate a defendant's intent in much the same way that courts regularly assess intent as an element in both civil

and criminal cases: by drawing reasonable inferences from both direct and circumstantial evidence. It is axiomatic that a defendant is presumed to intend the natural and predictable consequences of his voluntary actions, and this is no less true when applied to the personal jurisdiction context. When evaluating a defendant's intent to serve the forum State market, courts should be free to examine the entire universe of relevant evidence, including the defendant's use of new technology or innovative business practices to reach the forum State in unexpected ways.

This case involves two business practices: the Petitioner's use of an authorized nationwide distributor and its choice to target the entire United States market. Neither of these practices shields Petitioner from personal jurisdiction. First, the Question Presented states that Petitioner "targets the United States market for the sale of its products." Pet. Br. *i*. The fact that it accomplished this goal by utilizing an independent distributor does not offend the free will requirement because the decision to target the United States market was Petitioner's own. Second, the fact that Petitioner intended to serve the entire nation strengthens rather than weakens the inference that Petitioner intended to serve the New Jersey market. Because it targeted the nation as a whole, Petitioner cannot avoid liability by claiming that it never contemplated New Jersey as a possible market for its goods. That argument can only be described as willful blindness. New Jersey is a State within the union and falls within the geographic boundaries of Petitioner's

chosen market. Where a party designates a particular market for its products, it should logically be deemed to have included all component parts of that market. If it wishes to avoid jurisdiction in any particular area, it may do so by either defining its market more narrowly or taking reasonable steps to avoid sales to the excluded State. Here, Petitioner engaged in a distribution scheme authorizing its distributor to sell its products to consumers across the country with no indication that it wished to exclude sales to New Jersey residents.

♦

ARGUMENT

I. THE FIRST PRINCIPLES OF PERSONAL JURISDICTION: STATE POLICE POWERS, HORIZONTAL FEDERALISM, AND INDIVIDUAL LIBERTY

While the specific formulas have changed in order to keep pace with advances in technology and business practices, the Court's personal jurisdiction jurisprudence has always been informed by three fundamental principles. First, the States have a paramount interest in protecting their citizens from dangerous and defective products and the authority to do so pursuant to their traditional police powers. Second, each State's ability to exercise its power is limited by the concomitant powers of all other States, and each State's reach may not extend so far as to infringe upon the sovereignty of any of its sister States. Third, every individual has the right to choose

the jurisdictions to whose authority he voluntarily submits himself. This section of the brief examines these fundamental principles, while the next section illustrates how the Court's opinions have allowed the specific jurisdictional test to adapt to evolving commercial practices. In a later section, the brief argues that the Court should adopt a simple yet flexible rule for evaluating the defendant's intent to avail himself of the forum State market in much the same way that courts regularly evaluate intent as an element in both civil and criminal cases: by drawing reasonable inferences from available direct and circumstantial evidence. Finally, the brief argues that the lower court correctly concluded that Petitioner intended to avail itself of the New Jersey market where it targeted the entire United States as its intended market, took direct steps to advertise and sell its products to consumers across the Nation, made no distinctions between the individual States that make up that market, and gave no indication that it wished to exclude New Jersey.

The first principle of personal jurisdiction has been that each State has a paramount interest in protecting its citizens from dangerous products and providing a forum for relief when such a product causes injury or death. Products liability is a "traditional area of state regulation." *United States v. Morrison*, 529 U.S. 598, 615 (2000). As the Court has previously recognized in the preemption context, the States have traditionally regulated dangerous products in order to protect the public health, safety, and

welfare. *See Wyeth v. Levine*, ___ U.S. , 129 S.Ct. 1187, 1194-1195 (2009) (applying the presumption against preemption in a drug labeling case based upon the historic presence of state law causes of action that would cover such claims). In the choice of laws context, federal courts have long recognized that "[i]n product liability claims, the primary interest of the State is to deter the sale and/or manufacture of negligently or defectively manufactured goods to that State's citizens." *Cheatham v. Thurston Motor Lines*, 654 F.Supp. 211, 214 (S.D. Ohio 1986), *see also Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1360 (8th Cir. 1994) (holding that Canada, as the State where the injury occurred, had the most significant interest in the resulting product liability claim because its interest in protecting citizens from harmful products and protecting the expectation interests of victims far outweighed Missouri's interest in deterring wrongful conduct by its manufacturers). For example, in *Spence v. Glock, Ges.m.b.H*, 227 F.3d 308 (5th Cir. 2000), the Fifth Circuit reversed class certification and found that Georgia law did not apply to all of the plaintiffs' tort claims, reasoning that all 51 relevant jurisdictions in which class members are domiciled and purchased defective guns have an interest in ensuring that their consumers are adequately compensated. 222 F.3d at 314; *see also In re Ford Motor Co. Ignition Switch Products Liability Litigation*, 174 F.R.D. 332, 348 (D.N.J. 1997). The Fifth Circuit noted that each State may have a different understanding of what adequate compensation is and may view the manufacturer's home State as providing insufficient

protection for its citizens. *Id.* These cases illustrate a point that needs little explanation: each State has an overriding interest in protecting its own citizens from harmful products, providing a forum for relief, and deterring the sale of such products within its borders.

Although each State clearly has a strong interest in regulating dangerous and defective products and has the authority to do so pursuant to its traditional police powers, the nature of our federal system prevents it from doing so in a way that tramples upon the parallel powers of other States. Each State has a "vertical" relationship with the federal government and a "horizontal" relationship with all other States. While the Supremacy Clause elevates federal law above state law, each State has power and authority equal to that of its sister States. Under the Tenth Amendment, all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. Const. amend. X. The term "respectively" references the fact that the States' powers, though significant, have a natural limit imposed by the concomitant powers of all other States. Therefore, the second fundamental principle of personal jurisdiction is that each State may only exercise its power to an extent that does not improperly infringe upon its sister States. In the context of personal jurisdiction, issues related to horizontal federalism have traditionally been couched in terms of "state sovereignty," "comity," or simply "federalism," but are most clearly understood as a recognition that the States' mutually

competitive relationship within our federal system naturally places limits upon the powers of each individual State.

Personal jurisdiction law provides necessary limitations on each State's ability to exercise its traditional police powers over defendants beyond its physical borders. The amici States recognize that an overly-broad rule allowing for sweeping personal jurisdiction would prove to be a double-edged sword for the States, for each State has an interest in protecting its citizens from unjustly being haled into other States' courts. Each State must therefore balance its interest in prosecuting foreign defendants with its interest in protecting its own citizens from being abused in foreign courts. Our citizens are, after all, not only consumers, but also manufacturers, distributors, and sales agents, and we must strive for a rule that protects the respective rights of all parties. In this way, each State has an interest in preserving the limitation on States' power that requires each State to exercise that power "respective" of the identical powers granted to our fellow States. In the context of personal jurisdiction, the limitations of "horizontal federalism" act essentially as a Golden Rule for the States. We may exercise our jurisdiction over foreign defendants to the maximum extent to which we would allow other States to exercise their jurisdiction over our own citizens. The amici are satisfied that the approach proposed in this brief adequately protects our sovereignty and the balance of horizontal federalism by limiting each State's

exercise of jurisdiction to those cases in which the defendant has demonstrated an intent to serve the forum State market.

Third, personal jurisdiction law serves to protect individual liberty. Throughout its history, the Court's personal jurisdiction jurisprudence has remained faithful to a core understanding that jurisdiction must be based upon free will, as expressed through the voluntary action requirement always included in the Court's various jurisdictional tests. These tests, which have ranged from "physical presence" to "minimum contacts" to "purposeful availment," rest upon each person's inherent right to choose the jurisdictions to which he will submit himself. In *Pennoyer v. Neff*, 95 U.S. 714 (1850), Justice Field recognized the Due Process Clause of the Fourteenth Amendment as protecting this liberty interest. The evolution of the Court's personal jurisdiction cases demonstrates that the liberty interest at stake is not simply freedom from the burden of defending suits in far-off locations, but also the right to choose, among the co-equal sovereign States, those jurisdictions to which one submits.[1]

[1] While many scholars use the term "consent" to indicate this liberty interest, and tie it directly to John Locke's natural law theory of government by consent, we will instead use "intent" or "free will." *See, e.g.*, Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. Cal. L. Rev 257, 351 (1990); Andrew Kurvers Spalding, *In the Stream of the Commerce Clause: Revisiting Asahi in the Wake of Lopez and Morrison*, 4 Nev. L.J. 141, 153 (2003) "Consent," carries with it

(Continued on following page)

The three foundational principles of personal jurisdiction jurisprudence have traditionally been balanced by the use of jurisdictional tests that rest upon the defendant's intentional conduct and ask whether he has voluntarily chosen to reach the forum State market, either physically or through the stream of commerce. Where a party has engaged in voluntary conduct demonstrating the intent to serve the forum State market, a State may properly exercise its traditional police powers over him without offending either his individual liberty or the sovereignty of other States.

The amici States respectfully suggest that lower courts should be free to determine intent based upon the totality of the circumstances, considering both direct and circumstantial evidence. Just as courts have been able successfully to evaluate intent as an element in countless criminal and civil cases, so too would they be capable of doing so in the context of determining purposeful availment. Rather than restricting courts to technical formulas or a list of soon outdated examples, courts should be permitted to reach common sense conclusions based upon not only the defendant's direct actions uniquely and

the connotation that a person may freely revoke that consent at any time, whereas, under existing personal jurisdiction law, once a party has made the voluntary choice to engage in specific conduct, he is legally deemed to have submitted himself to jurisdiction regardless of whether he subjectively wishes that he were not subject to the forum state's authority.

specifically aimed at the forum State, but also the surrounding circumstances and the defendant's reasonable expectations.

II. THE COURT HAS ADAPTED THE SPECIFIC REQUIREMENTS OF PERSONAL JURISDICTION TO ACCOMMODATE CHANGING BUSINESS PRACTICES BUT HAS ALWAYS REQUIRED AN ELEMENT OF INTENT IN ORDER TO SATISFY DUE PROCESS AND PRESERVE THE BALANCE OF POWER AMONG THE STATES

The Court has explicitly recognized that the specific requirements of personal jurisdiction jurisprudence must accommodate changes in the way Americans do business. In *Hanson v. Denckla*, 375 U.S. 235, 250-51 (1958), the Court stated,

> As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff* to the flexible standard of *International Shoe Co. v. State of Washington*.

(Internal citations omitted). The *Hanson* Court explained that the evolution of personal jurisdiction law

does not herald the eventual demise of all restrictions. *Id.* Limitations upon State power to exercise jurisdiction over a foreign defendant must always remain firmly rooted in an understanding of horizontal federalism and individual liberty. *Hanson* teaches that intent should not be abandoned as a foundational principle, but that the Court may adjust the ways in which intent to serve the forum State market is established, in order to accommodate advances in technology and business practices.

In *Pennoyer v. Neff*, Justice Field recognized the Fourteenth Amendment Due Process Clause as an important safeguard to both State sovereignty and the natural rights of citizens. *See, e.g.*, Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. Cal. L. Rev 257, 351 (1990). Justice Field's opinion is built upon "two well-established principles of public law." *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). First, that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." *Id.* Second, that "no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* From these two principles, the Court fashioned a narrow territorial rule that restricted the ability of States to exercise personal jurisdiction over individuals not physically present within the State's territorial boundaries. *Pennoyer*, 95 U.S. at 723.

In *International Shoe v. Washington*, 326 U.S. 310, 316 (1945), the Court adjusted the purely geographic territoriality of *Pennoyer* to accommodate an

"expanding concept of presence." Kogan, 63 S. Cal L. Rev. at 351. Rejecting the previous test's rigid adherence to physical boundaries, the Court in *International Shoe* refashioned the rule to analyze whether the defendant had certain minimum contacts with the forum State such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316.

In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court reiterated the importance of the defendant's voluntary contacts with the forum, holding that even where traditional notions of fair play and substantial justice would weigh in favor of exercising jurisdiction, the State may not do so unless the defendant has purposefully availed himself of the privileges and benefits of doing business in the forum State. 444 U.S. at 294-95. The Court also emphasized, however, that additional factors inform the reasonableness of jurisdiction given the "nationalization of commerce." *Id.* at 293 (quoting *McGee v. Intl'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)). Such factors include the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution possible, and the shared interest of the several States in furthering substantive social policies. *Id.* at 292. While the Court identified these reasonableness factors as important considerations, it plainly held that reasonableness alone cannot justify the exercise

of personal jurisdiction over an individual who has not voluntarily established minimum contacts with the forum State. *See* Andrew Kurvers Spalding, *In the Stream of the Commerce Clause: Revisiting Asahi in the Wake of Lopez and Morrison*, 4 Nev. L.J. 141, 153 (2003). The Court thereby adapted its personal jurisdiction jurisprudence to changing markets, while recognizing and remaining faithful to the principle that jurisdiction must be based upon free will and the intent to serve the forum market. *See Id.* at 151-53.

In *World-Wide Volkswagen*, the Court articulated an approach to personal jurisdiction that hinges on the exercise of free will – each individual has notice as to the type of activities that will subject him to suit in a given State and the ability to either avail himself of the benefits of doing business in that State with the knowledge that doing so will allow the State to exercise jurisdiction over him, or alternatively, to sever ties with that State in order to avoid jurisdiction. Spalding, 4 Nev. L.J. at 153. Therefore, while a defendant's mere awareness that its products may find their way to the forum State through the unilateral actions of others is not sufficient to establish personal jurisdiction, "[t]he forum [s]tate does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by the consumer in the forum [s]tate." *World-Wide Volkswagen*, 444 U.S. at 297-98.

In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), the Court grappled yet again with the problems posed by a dramatically changing world market which does not easily lend itself to the formulation of a lasting test for minimum contacts. The issue before the Court was whether the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States could reach the forum State in the stream of commerce constitutes "minimum contacts" between the defendant and the forum State such that the exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *Asahi Metal Indus. Co.*, 480 U.S. at 105 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Eight justices agreed that subjecting the defendant to personal jurisdiction in California was "unreasonable and unfair," and therefore impermissible, regardless of whether Asahi had established minimum contacts with the State. 480 U.S. 102, 116 (plurality opinion); *id.* (Brennan, J., concurring in part). As to the minimum contacts analysis, however, the Court was deeply divided. *See Asahi*, 480 U.S. at 103-04.

Four justices found that Asahi had established minimum contacts with California. *Id.* at 116 (Brennan, J., concurring in part). In this view, the "stream of commerce" referred to the "regular and anticipated flow of products from manufacture to distribution to retail sale" and necessarily contains an element of notice to the defendant. *Id.* at 117. Although Justice

Brennan's test is often referred to as one of foreseeability, it is more accurately understood as one of clear expectation. Justice Brennan cited *World-Wide Volkswagen* to emphasize that, while foreseeability is not wholly irrelevant to the inquiry, "the foreseeability that is critical to the due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there." 480 U.S. at 118 (quoting *World-Wide Volkswagen*, 444 U.S. at 297). Brennan again quoted *World-Wide Volkswagen* to stress that "[t]he forum State does not exceed its power under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce *with the expectation that they will be purchased by consumers in the forum State*," adding his own emphasis to differentiate this type of expectation from the mere foreseeability that one's products *may* be purchased by forum State consumers. *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

Justice O'Connor, also writing for four justices, found that Asahi lacked sufficient minimum contacts with California. *Asahi*, 480 U.S. at 112-13. Justice O'Connor's approach would require additional voluntary actions evincing an intent or purpose to serve the forum State market. *Id.* at 112. To illustrate her point, Justice O'Connor provided several examples of "additional conduct" that would be sufficient to establish minimum contacts: designing the product for the

market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *Id.* Since *Asahi*, Justice O'Connor's enumerated examples have essentially become keys to unlocking personal jurisdiction, with litigants trying to fit modern-day practices into these few pigeonholes of "additional conduct" accepted as sufficient to support jurisdiction. *See, e.g.*, App. 21a, 24a.

Justice Stevens disagreed with both Justice Brennan and Justice O'Connor. *Asahi*, 480 U.S. at 121-22 (Stevens, J., concurring in part). According to Justice Stevens, something more than mere awareness must be required, but there are no clear dividing lines between "mere awareness" and "purposeful availment." *Id.* In Justice Steven's view, whether conduct rises to the level of purposeful availment requires a fact-specific determination, which must consider the volume, value, and hazardous character of the products at issue. *Id.* at 122.

After *Asahi*, lower courts have required varying levels of contact to establish personal jurisdiction under the stream of commerce theory, unable to agree upon the exact test to apply. *See* Christopher Porterfield, *Which Stream to Follow: Why the Eleventh Circuit Should Adopt a Broader Stream of Commerce Theory in Light of Growing E-Commerce Markets*, 20 Ga. St. U. L. Rev. 539, 550-51 (2003). Yet, in the area of internet commerce, lower courts have gradually

developed a body of law that is illustrative of the type of rule the Court should now adopt more generally. Courts dealing with internet commerce have remained faithful to the intent requirement, but have allowed the defendant's intent to be inferred based upon the specific type and quantity of activity it conducts over the internet. This flexible approach has allowed the stream of commerce theory to adapt to a dramatically changing commercial landscape, which now includes internet websites, social media, and interactive applications for mobile devices.

Today, new technology and business practices make the sale of goods across state and national borders both easy and commonplace. The Sixth Circuit Court of Appeals has noted that the internet represents the culmination of trends toward a global marketplace because the internet allows anyone "to operate an international business cheaply, and from a desktop." *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996). Several lower courts have adapted the stream of commerce theory to this new context by fashioning a rule requiring that the defendant's intent to reach the forum market be demonstrated through deliberate conduct, but allowing courts to consider, as a part of that intent inquiry, the nature of the defendant's website, the nature and quantity of information exchanged between the parties over the internet, the website's level or interactivity, and the defendant's history of conducting business over the internet (both inside and outside the forum State), and other facts indicating the intent

to transact business. *See* Carly Henek, Note, *Exercises of Personal Jurisdiction Based on Internet Web Sites*, 15 St. John's J. Legal Comment 139 (2000). The internet rule allows courts to examine all relevant evidence and exercise jurisdiction where the evidence indicates that the defendant either engaged in conduct uniquely aimed at the forum State or, if its activities were aimed more broadly, it expected or hoped that the results of its conduct would include availment of the forum State market.

Just as the Court in *Asahi* held that foreseeability that one's products will enter the forum State is not enough, on its own, to establish jurisdiction, lower courts have held that "the mere existence of a website that is visible in a forum and that gives information about a company and its products is not enough, by itself, to subject a defendant to personal jurisdiction in that forum"; and "[s]omething more is necessary, such as interactive features which allow the successful online ordering of the defendant's products." *Cossaboon v. Maine Medical Center*, 600 F.3d 25, 35 (1st Cir. 2010) (quoting *McBee v. Delica Co.*, 417 F.3d 107, 124 (1st Cir. 2005) (addressing analogous issue of extraterritorial jurisdiction under the Lanham Act)); *see also Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 549 (7th Cir. 2004); *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 399 (4th Cir. 2003); *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 483 (6th Cir. 2003) (per curiam); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002). In *Zippo Mfg. Co.*

v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 42 U.S.P.Q.2d (BNA) 1062 (W.D. Pa. 1997), the federal district court elucidated a "sliding scale" test for personal jurisdiction based on the nature and quality of commercial activity conducted over the internet. The test focuses on whether the website is merely passive, providing information to an interested party, or interactive, allowing the party to communicate with the website author, especially when that interaction allows the party to purchase goods or services via the website. *Id.* This test was adopted and modified by a federal district court in Oregon in *Millennium Enterprises, Inc. v. Millennium Music, LP*, 33 F. Supp. 2d 907 (D. Or. 1999), to include a "deliberate action" requirement, which is satisfied if the defendant either engaged in transactions with forum State residents or purposefully directed its conduct to the forum State. 33 F. Supp. 2d at 921. The *Zippo/Millennium* test has been much quoted and generally followed by other jurisdictions. Richard E. Kaye, Annotation, Internet Web Site Activities of Nonresident Person or Corporation as Conferring Personal Jurisdiction Under Long Arm Statutes and Due Process Clause, 81 A.L.R. 5th 41, § 5 (2000). These cases demonstrate that, since the Court decided *Asahi*, lower courts have created a workable framework for analyzing personal jurisdiction in the completely new world of internet commerce by maintaining the purposeful availment requirement but allowing courts to consider all relevant evidence to evaluate intent.

III. THE COURT SHOULD PRESERVE THE PURPOSEFUL AVAILMENT TEST BUT ALLOW LOWER COURTS TO APPLY IT MORE FLEXIBLY

To echo Justice O'Connor's opinion in *Asahi*, in each case the court must determine whether the defendant's conduct indicates an *intent or purpose* to serve the market in the forum State. *See Asahi*, 480 U.S. at 112. The amici States respectfully ask that the Court adopt a flexible approach that preserves the intent requirement but allows courts to establish intent to serve the forum State market through consideration of the complete universe of relevant evidence. Such evidence could include specific conduct aimed uniquely at the forum State, the expectation that one's products will be purchased by residents of the forum State, business decisions made in reliance on that expectation, the extent to which the defendant benefits from transactions with the forum State, the use of new technology or marketing techniques to reach the forum State in innovative ways, and the scope and nature of the market which the defendant voluntarily chooses to target (for example, whether the products were explicitly aimed at a nationwide market or a smaller local market). Conversely, courts should also consider any evidence evincing a desire *not* to do business in the forum State, such as the defendant's instructions to its distributor or the refusal to advertise or ship products to the forum State.

As the Court's previous personal jurisdiction cases have shown, the rule must be flexible in order to withstand the test of time. Each rule the Court has previously articulated has eventually been bypassed by technical innovations and evolving business practices that allow the purveyors of dangerous and defective goods to reach our States in ways unanticipated by the controlling legal test. Each time this has happened, the States have been hindered in their ability to protect their citizens from dangerous and defective products until the Court has articulated a new test. As demonstrated above, the Court's precedents allow for, and in fact encourage, the use of a flexible evolving test, so long as it stays true to the constitutional touchstone of free will by imposing an intent requirement. *See Hanson v. Denckla*, 375 U.S. 235, 78 S. Ct. 1228 (1958). The rub comes in trying to determine the minimum level of conduct necessary in order to infer intent or purpose. The Court in *Asahi* split over this issue, but we contend that Justice Brennan's focus on the defendant's expectation and Justice O'Connor's emphasis on voluntary conduct are not mutually incompatible. In fact, when used together, they allow courts to infer intent to avail oneself of the forum State market in much the same way that state and federal courts are able to successfully assess intent as an element in both civil and criminal cases every day.

IV. COURTS SHOULD BE ALLOWED TO INFER INTENT TO SERVE THE FORUM STATE MARKET BY DRAWING REASONABLE CONCLUSIONS FROM BOTH DIRECT AND CIRCUMSTANTIAL EVIDENCE

In other areas of the law, it is not uncommon for courts to determine intent or purpose by asking whether the defendant specifically desired to bring about the prohibited outcome or whether the defendant expected that his actions would bring about that result and proceeded to engage in the conduct. *See* Model Penal Code § 2.02. The same approach is valid for assessing a party's intent to serve the forum State market. The Court has previously emphasized that fact-finders may infer intent from conduct, stating that, "[i]ndeed, in the many cases where there is no direct evidence of intent, that is exactly how intent is established." *Rose v. Clark*, 478 U.S. 570, 581 (1986) (citing *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985); *Ulster County Court v. Allen*, 442 U.S. 140, 157-163 (1979)). "It is a general axiom of law that every sane person is presumed to intend the ordinary, natural, probable, or necessary consequences of his or her voluntary, intentional, and deliberate act." 40A Am. Jur. 2d Homicide § 251 (2010). To prove murder, it is thus unnecessary to prove that the defendant subjectively had the specific intent to kill or do great bodily harm, or that the defendant knew with certainty that his or her acts would achieve murderous results; it is sufficient to show that the defendant voluntarily and willfully committed an

act, the natural tendency of which was to destroy another's life. *Id.*

From the Court's use of terms such as "voluntary," "deliberate," and "purposeful," it appears that the Court may require some level of willfulness beyond simple probability. Looking again to criminal law for guidance, the Model Penal Code § 2.02 states that "[a] requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears." Model Penal Code, § 2.02(8), General Requirements of Culpability. The Model Penal Code states that a person acts knowingly with respect to a material element of an offense when:

> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Model Penal Code, § 2.02(2)(b).

The amici States suggest that, in the context of determining whether a defendant intended to avail himself of the privileges and benefits of doing business in the forum State, courts should similarly be allowed to infer the defendant's intent by drawing reasonable conclusions informed by all relevant evidence. This evidence could include direct actions

aimed specifically at the forum State or the lack thereof, but should also include the surrounding circumstances and the defendant's reasonable expectations. Courts should be permitted to reach common sense conclusions rather than being needlessly constrained by outdated examples, such as those found in Justice O'Connor's *Asahi* opinion. Such an approach respects the fundamental requirement that jurisdiction be based upon free will. A party will not be deemed to have purposefully availed itself of the forum market if its products reached the forum State through mistake, inadvertence, or the unilateral actions of third parties. At the same time, a general rule framed in the language of intent would prove to be flexible enough to adapt to future technologies and business practices that are unforeseeable to us today. Such rules have already proven to be flexible enough to allow for the infinitude of ways that intent may be demonstrated in criminal cases.

A party would also be able to "opt out" of jurisdiction in any State in which it does not wish to be subject to suit. For example, if Petitioner had wished to target the United States as a whole but felt that New Jersey law was too onerous, New Jersey courts were unfairly biased, or that traveling to New Jersey to defend a products liability suit would pose too great a burden, the company would be free to exempt New Jersey from its nationwide market by taking reasonable steps to avoid that State's market. The company could instruct its distributor not to sell products within New Jersey or to New Jersey

residents, could refuse to advertise there, or could refuse to ship its products to the State. Such measures would only be necessary when a defendant chooses to define its targeted market broadly but wants to exclude from that market some component jurisdiction.

V. PETITIONER PURPOSEFULLY AVAILED ITSELF OF THE NEW JERSEY MARKET BY UTILIZING A NATIONWIDE DISTRIBUTION SCHEME WHICH TARGETED THE ENTIRE UNITED STATES

At the heart of this dispute is the fact that companies are now able intentionally to define their target markets, and those markets now operate on a scale that does not necessarily differentiate among political subdivisions within the whole. Petitioner purposefully utilized an exclusive nationwide distributor to market and sell its products throughout the United States and, therefore, chose to define as its target market the entire country. The Petitioner's Question Presented acknowledges that "the manufacturer targets the United States market for the sale of its products." Pet. Br. *i*. Although Petitioner's own language assumes that it targeted the entire United States as its chosen market for its products, it argues that its exclusive distributor was the party which actually sold the products nationwide, and that it cannot be held responsible for the actions of distributor third party. Having framed the question as one in which the manufacturer "target[ed] the United States

Market," Petitioner should not be permitted to hide behind its exclusive distributor and claim it had no part in the sale of its product in the United States. Just as the use of an internet website is a new and innovative marketing approach which allows businesses to reach consumers in unexpected ways, the Petitioner's use of an exclusive American distributor to accomplish Petitioner's goal of "target[ing] the United States Market" is a business practice to which jurisdictional jurisprudence must adapt. Petitioner identifies three lower-court cases extending jurisdiction over foreign defendants based upon each company's use of an independent distributor to accomplish specific sales and marketing goals, arguing that these cases demonstrate courts' tendency to abuse Justice Brennan's stream of commerce test. Pet. Br. 45-46. Rather than demonstrating abuse, these cases simply indicate that the use of an independent distributor is now a recognized way in which some companies choose to accomplish their sales goals.

Petitioner also takes issue with the New Jersey Supreme Court's conclusion that, by targeting the United States as a whole, it necessarily targeted each and every State, including New Jersey. *See* Pet. Br. 28-29 ("The New Jersey Supreme Court found that only the United States was in Petitioner's sights . . . [but n]o jurisdictional evidence was presented that J. McIntyre had ever taken the slightest purposeful act toward New Jersey."). Petitioner is, therefore, arguing in favor of a specific aiming requirement which would shield it from personal jurisdiction absent proof that

it targeted the forum State in some *unique way* and took specific steps aimed *solely* at the forum State. Such a rule is inapplicable where the defendant targets the forum State by targeting all States equally within a national distribution scheme. Moreover, a direct aiming requirement could allow companies to freely market dangerous or defective products nationwide at a reduced risk of liability as compared to local businesses. Simply by utilizing new technology, such as an internet website or a mobile phone application, which would make it feasible to target the United States as a whole without ever establishing a physical presence in any State, foreign companies would be able to sell dangerous or defective products in the United States without having to factor in the additional cost of defending lawsuits and facing liability when those products cause harm.

Such a rule is not only dangerous, it ignores the plain understanding that the "entire United States" necessarily includes each and every State. When a party intentionally defines its target market as a discrete geographic area and takes active steps to serve the consumers in that geographic area, without differentiating between political subdivisions within the whole, the party must necessarily be deemed to have targeted every jurisdiction which is physically located within the market it has defined. A nationwide marketing scheme is sufficient to establish purposeful availment as to the entire United States.

Similarly unpersuasive is Petitioner's argument that it was not aware of New Jersey as a possible

sales locale for its machines. *See* Pet. Br. 28. As stated, Petitioner knowingly marketed its products to the United States as a whole. New Jersey unequivocally falls within that target market. Yet Petitioner now refers to New Jersey as "a place [a foreign defendant] may never have heard of." Pet. Br. 36. Ignorance of the fact that New Jersey is a State within our union, or of the specifics of New Jersey products liability law, should not allow Petitioner to avoid jurisdiction. Its own lack of research prior to embarking on a nationwide marketing campaign is no defense. Drawing again on the comparison to criminal law, Petitioner's position is as flawed as that of a criminal defendant who admits to having bombed a building with the intent to kill everyone inside and the hope of killing as many people as possible but argues that he lacked the requisite intent to kill a particular victim because he didn't know the individual and never contemplated that she might be inside the building.

♦

CONCLUSION

For the foregoing reasons, this Court should affirm the New Jersey Supreme Court's decision.

Respectfully submitted.

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